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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 29

UNITED STATES OF AMERICA,

Appellant,

—against—

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., *et al.*

On Appeal From the United States District Court for the Southern District of New York

APPELLEES' JOINT BRIEF

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UNITED STATES OF AMERICA,

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—against—

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' JOINT BRIEF

The United States brought this civil antitrust suit under Section 4 of the Sherman Act (15 U.S.C. § 4) to enjoin an export trade association from selling American-produced phosphate fertilizers to foreign customers whose purchases are financed by the United States foreign aid program. Appellant claims that such sales are not "export trade" as defined by the Webb-Pomerene Export Trade Act (15 U.S.C. §§ 61, 62) and that consequently the cooperative marketing activities of the association necessarily violated Section 1 of the Sherman Act (15 U.S.C. § 1).

Trial was had on a stipulated record which limited the issue to the legality of certain sales made to the Republic of Korea during 1961-1966. The district court entered judg-

ment on September 11, 1967 dismissing the complaint on the ground that "there is no violation of [the] antitrust laws because the activities of defendants were immunized by the Webb-Pomerene Act" (App. 365; 273 F.Supp. 263, 274).

Administrative action by the United States which drastically limited the eligibility of export trade associations to participate in transactions financed by the foreign aid program caused defendants to suspend all operations in June of 1967, and the association was formally dissolved by action which became effective on December 28, 1967.[1]

The Court noted probable jurisdiction of the Government's appeal on April 1, 1968.

Question Presented

Appellees are not satisfied with appellant's statement of the issue (GB 2) and submit the following:

Whether a properly constituted export trade association, engaged in the world-wide marketing of American-pro-

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[1] In Appellees' Motion to Affirm or Dismiss, filed March 15, 1968, we have briefed the facts and the law which show that this case has been mooted by the administrative action taken by the United States and its subsequent effect in causing the dissolution of the export association. We do not repeat that argument here, but respectfully invite the Court's renewed attention to that Motion and again note that an appropriate disposition of the case would be dismissal of the appeal with instructions to vacate the judgment below. *Pope* v. *Daggett*, 384 U.S. 33; *United States* v. *Alaska S.S. Co.*, 253 U.S. 113; *Commercial Cable* v. *Burleson*, 250 U.S. 360; *Mills* v. *Green*, 159 U.S. 651. Dissolution and abandonment under the conditions present here are clearly different from the voluntary discontinuance of an allegedly unlawful practice under the pressures of litigation. Compare *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, and other cases cited by appellant on the mootness question. (GB 28-29, n. 19).

duced commodities, is engaged in "export trade" or an "act done in the course of export trade" within the meaning of the Webb-Pomerene Export Trade Act when, in active competition with foreign suppliers, it sells such commodities for direct shipment to the Republic of Korea and Korea's purchases are financed pursuant to the United States foreign aid program.

Counter-Statement

The Government's "Statement" (GB 3-13) is notable for its scant attention to the facts and in particular for its complete omission of any reference to the active competition which defendants faced from foreign suppliers whose Korean sales were also financed by the United States foreign aid program.

1. The Defendants: Their World-Wide Export Trade Pursuant to the Webb-Pomerene Export Trade Act

The defendants are five Florida producers of concentrated phosphate fertilizers and their joint export trade association, the Concentrated Phosphate Export Association, Inc. ("CPEA"), which was organized in 1961 and duly registered with the Federal Trade Commission as a non-profit corporation "to engage solely in export trade," as that term is defined in the Webb-Pomerene Export Trade Act, 15 U.S.C. § 61 (sometimes referred to here as the "Webb Act" or the "Export Trade Act"). (App. 42-44, 63). It is stipulated that CPEA was properly organized pursuant to the terms of that statute, has observed all of its requirements, and has violated none of its prohibitions, unless, and only to the extent that, the transactions in suit are found not to constitute "export trade" (App. 42, 45, Stip. 1, 12).

CPEA was a "full functioning" export association, acting as a merchant of its members' phosphate fertilizers. That is to say, it was not limited to establishing the prices at which its members' goods would be sold, nor to allocating available business among them, but performed all the functions of an export marketing organization, including the development of foreign markets, appointment of agents, product promotion, negotiation of sales contracts, preparation and submission of bids, arrangements for ocean transportation, arrangement of credit and other terms and conditions of sale, and the vast amount of paper work involved in export documentation, billings and collections (App. 52-54, 63-68, 264, 266-268, 303, 315). In order to carry out these functions, the association had offices and a full-time staff with headquarters in New York City (App. 43, Stip. 2). Dealings between CPEA and its members were governed by a Membership Agreement (App. 69-76), and the internal functioning and powers of CPEA—including the powers of contract, borrowing money, holding property and establishing agencies—were determined by its Certificate of Incorporation and By-Laws (App. 63-68; Ex. 4, pp. 59-67).

All of CPEA's members produced concentrated phosphate fertilizers in Florida plants from phosphate rock mined in Florida (App. 43-44, Stip. 3-8). The fertilizers were transported directly from production plants to Florida seaports, where they were loaded on ships for export to foreign consumers (App. 46, Stip. 14). CPEA purchased the commodities from its members at prices established from time to time by a board of directors representing all of the members; and resold them in the export market at prices and on terms and conditions which it determined, subject, however, to minimum prices established from time

to time by its directors (App. 71, ¶ Fourth; App. 73, ¶ Ninth). Each member was entitled to participate in the association's business in proportion to its percentage of the total concentrated phosphate production capacity of all members (App. 71, ¶ Sixth).

During the six years it was in existence, CPEA sold concentrated phosphates for export to thirty-nine foreign countries in active competition with a large number of major foreign producers located in Tunisia, Morocco, Portugal, Mexico, Germany and the Netherlands, among other countries, and twenty-one American suppliers who were not members of the association.[2] Except for the particular Korean sales in suit, the Government does not dispute that CPEA's world-wide marketing activities were entirely lawful (App. 42, 45, Stip. 1, 12).

2. CPEA's AID-Financed Korean Export Sales: General Description

The Republic of Korea procured concentrated phosphates from American and foreign suppliers on thirteen occasions during the times material to this case (App. 50, 327-340). Each purchase was made on the basis of supply contracts awarded after formal competitive bidding in which not less than three, and as many as thirteen, competing suppliers participated on every occasion (App. 327-340). CPEA submitted bids on twelve of the transactions and was awarded at least some of the business on nine of them (*Ibid.*).

[2] The United States foreign aid program is itself contributing to the creation of additional foreign competition in world markets for concentrated phosphates by guaranteeing fertilizer plant investments in India, Nicaragua, Morocco and elsewhere and by financing the construction of plants in Korea (App. 60-61, Stip. 42-43).

One of the twelve Korean transactions on which CPEA bid and received an award was funded from the Republic of Korea's own supply of dollars (App. 50-51, Stip. 25). The legality of that sale is not disputed here—presumably because it was not financed through regular foreign aid procedures.

Another Korean purchase was financed by a special Stabilization Fund granted by the United States in 1961 "to meet Korea's need for foreign exchange and to offset the anticipated short-term reduction in Korea's dollar earnings resulting from Korea's major reform in 1961 of its monetary exchange system" (App. 51, Stip. 25). CPEA's sale on that occasion is also unchallenged here, and thus is conceded to be "export trade" within the Webb Act—presumably because administrative regulations governing the foreign aid program were not applicable. The transaction was, however, controlled by Korea's usual procurement regulations (App. 189-200) and by the provisions of an agreement between the two governments which embodied the substance of the principal financing requirements of the foreign aid program (App. 51, Stip. 25).

The remaining ten Korean transactions in which CPEA participated were all financed by the foreign aid program pursuant to the terms of applicable Korean and United States statutes, the provisions of bilateral agreements between the two countries, and relevant administrative regulations of the two governments. CPEA's activities were the same in these instances as they were in all of the association's world-wide sales, including the first two Korean tenders described above, except for the additional documentation required by AID's regulations. In each instance the goods offered and sold by CPEA were exported

from the United States to Korea in competition with foreign suppliers. In spite of these facts, the Government urges that the transactions here in issue were not in "export trade", only because they depended on foreign aid financing and were subject to regulations applicable to such financing.

In addition to its Korean exports, CPEA sold to many other foreign customers, including some whose purchases were also financed by AID funds. In most, if not all, of these latter instances, the buyer did not arrange for AID financing until after his supply contract had been awarded or negotiated. (App. 54, Stip. 36). The Government does not dispute the lawfulness of such sales, although their eligibility for foreign aid financing was also contingent on full compliance with AID's regulations at all stages of the negotiations. (App. 42, 45, 54, Stip. 1, 12, 36).

3. Korea's AID-Financed Procurements

a. The United States foreign aid program

In one form or another, economic assistance has been extended by the United States to foreign nations since at least as early as World War I, and has most recently been formalized under the "Marshall Plan" and its various successors of the last two decades.[3] The basic statute controlling present programs of foreign aid is the Foreign Assistance Act of 1961, 75 Stat. 424, as amended, 22 U.S.C. § 2151, which serves the twin purposes of supporting the maintenance of freedom and mutual security abroad and of encouraging the development of permanent American

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[3] See, *e.g.*: BANE & LUTZ, ORGANIZATION OF AMERICAN RELIEF IN EUROPE, 1918-1919, Stanford Univ. Press (1943); FEDERAL TRADE COMMISSION, FOREIGN TRADE, SERIES No. 2, at 6-7 (1935); App. 52; Economic Cooperation Act of 1948, 62 Stat. 137; and the Mutual Security Act of 1954, 68 Stat. 832.

export markets by making temporary economic assistance available to offset a portion of the foreign exchange costs necessary to meet import and capital requirements of cooperating countries.[4]

In furtherance of the provisions of that Act, Congress has each year been asked to appropriate funds to support foreign assistance programs administered by the Agency for International Development ("AID"), successor organization to the International Cooperation Administration ("ICA"). Those funds are not "earmarked" by Congress, either for specific countries or for particular commodities, but are allocated by AID as a discretionary matter according to terms set both by Congress and by the provisions of bilateral agreements between the United States and each cooperating country. (App. 46-49).

Such aid is made available on a grant or a loan basis, and in either case the repayment obligations assumed by beneficiary nations vary widely. In practice, the distinction between the two forms of assistance tends to be blurred because of the liberal terms on which loans are extended and the conditions and obligations attached to grants.[5] However, cooperating countries which receive grant aid are invariably obligated to deposit in "counterpart funds" the amounts of local currency generated by the import and resale of AID-financed goods. Drawing rights on those funds, as well as other terms and conditions of the grant aid, are laid down in agreements between the United States and the cooperating country.

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[4] See, *e.g.*, testimony of David E. Bell, AID Administrator, before Senate Banking and Currency Committee, 111 CONG. REC. A 1346 (daily ed. March 23, 1965).

[5] See ASHER, LOANS, GRANTS AND LOCAL CURRENCIES 7, The Brookings Institution (1961).

b. *The United States aid program for Korea*

The United States and the Republic of Korea have since 1953 been parties to agreements providing for economic, technical and related assistance to the latter country (App. 47, 77-140).[6] The basic agreement in force during the years involved in this case took the form of an exchange of notes by the two governments on February 8, 1961 (App. 77-89). That agreement, and others incidental to it, controlled Korea's use, as a sovereign nation, of the foreign aid it received from the United States, and, in case of conflict, the agreements took precedence over AID's administrative regulations (App. 111, Section 4.1).

In consideration of the economic and related assistance it was to receive, Korea, for its part, undertook two principal obligations; reaffirmation of her responsibilities under a 1953 treaty of mutual defense, and creation of a counterpart fund (App. 83-84, ¶ 3-4).

The Korean government resold to its nationals the concentrated phosphates, and other commodities, which it purchased and imported with AID grant funds. All local currency received from the resale was deposited in the counterpart fund, and it was agreed in principle that the amount of the fund should be closely equivalent to the dollar landed cost of the imported goods (App. 94, ¶ 2).[7]

The entire amount of the Korean counterpart fund was "available to the Government of the United States" for its local currency requirements (App. 79, ¶ 4), but in prac-

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[6] Korea has received similar assistance from other countries, including Japan and West Germany (App. 48, Stip. 19).

[7] Balances remaining in the counterpart fund at the end of the aid program are to be liquidated as agreed by the two governments, subject to approval of the United States Congress (App. 79, ¶ 4).

tice the major portion of it went to support the Korean military budget. In this way, Korea has been able to maintain 50,000 troops in Vietnam and to play a "major role with the United States in the containment or deterring of Communist aggression in South Vietnam and Northeast Asia."[8]

AID's role in Korea's commodity import and development programs has been that of a financing agency and advisor, working with Korean agencies to determine that country's import commodity needs and foreign exchange requirements and, at the same time, rationalizing those needs and requirements with the overall budget for United States foreign aid (App. 48-49, Stip. 20-21; App. 108-120). The basic decisions on Korea's needs and proposed imports were Korean decisions, and it is specifically agreed between the two countries—as independent, sovereign nations—that the Republic of Korea has "full responsibility for procurement and speedy delivery" (App. 102, ¶ 1).

c. AID's role and regulations

There is no doubt that AID, as the administrator of this country's foreign assistance program, exercises a high degree of supervision over the foreign trade transactions which it finances. To characterize it in the Government's terms, however, as determining "every significant detail of the entire transaction" (GB 9), or to suggest that it is the purchaser in such transactions (GB 15), is entirely inconsistent with the facts and with AID's own description of its role in public pronouncements and official documents.

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[8] AGENCY FOR INTERNATIONAL DEVELOPMENT, U.S. FOREIGN AID IN EAST ASIA, 23, 25, Washington, D.C. (1968).

It is stipulated here that "AID did not itself procure any concentrated phosphates for Korea" and, that "AID, in its official publications, is characterized as essentially a financing institution. . . ." (App. 49, Stip. 21). Appellant may not now make the contrary assertion that the "goods [are] sold to the United States for export. . . ." (GB 15).

The AID program was never intended to, and does not, supplant ordinary channels of trade, nor change the substance of transactions between American suppliers and foreign buyers.[9] It is a method of financing the foreign exchange costs of international transactions essential to our friends and allies who are themselves unable to meet those costs. A temporary measure, foreign aid, whether it takes the form of grants or of loans, has been consistently represented by its proponents and administrators as a means of stimulating export trade which obtains a net economic advantage for the United States in world markets.[10]

AID's part in Korea's international commodity transactions begins when it receives for evaluation and review, in consultation with Korean government officials, the esti-

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[9] App. 49, Stip. 21; and see, *e.g.*, *Hearings Pursuant to S. Res. 26 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 76, 85 (1967).

[10] "In fiscal year 1967, AID economic programs financed more than $1.3 billion in export sales for American firms. Among other items, AID financed the export of $109 million in fertilizer, $150 million in chemicals, $120 million in iron and steel products, $360 million worth of machinery and equipment and $127 million worth of motor vehicles, engines and parts. These exports create several hundred thousand American jobs and build permanent markets for future cash exports." Agency for International Development, The Task of Development 30 (1968). See also COMMITTEE ON FOREIGN AFFAIRS, REPORT ON H.R. 15263, H.R. REP. No. 1587, 90th Cong., 2nd Sess. 10 (1968).

mates and projections for import commodity needs prepared by Korean agencies. These estimates and projections, as finally determined, together with those from all other cooperating countries, are the raw materials on which AID bases the total foreign aid budget to be presented to Congress. (App. 48, Stip. 20-21).

A particular international commodity transaction to be financed from AID funds is initiated by Korean officials when, having decided on the type and quantity of commodity they wish to purchase on the world market, they submit a "Procurement Authorization Application" to AID (App. 48-49, Stip. 21). That application is approved when AID, in turn, issues a "Procurement Authorization" (App. 49), on the authority of which the transaction can be financed from grant or loan funds and a letter of credit opened in favor of the supplier or suppliers (App. 102-107).[11]

The principal responsibility for Korea's procurement of concentrated phosphates under the AID program was vested in the Office of Supply, Republic of Korea ("OSROK") (App. 51, Stip. 27), although the two governments agreed that in special circumstances an agency of the United States might act as the procurement authority at OSROK's request and on its behalf (App. 102).

Of the eleven Korean procurements of concentrated phosphates financed by AID, OSROK handled nine directly and the United States General Services Administration ("GSA") undertook two. The other two purchases made

[11] In the transactions involved in this case, the Bank of Korea opened a letter of credit in favor of the supplier and instructed its United States correspondent—the J. Henry Schroder Banking Corporation—to make payment in dollars to the U.S. or foreign supplier. The Schroder Bank, in turn, was reimbursed by AID pursuant to a Letter of Commitment.

by Korea, one from its own foreign exchange and the other from the special Stabilization Fund granted to it by the United States, were also handled by OSROK. (App. 50). AID did not itself exercise any procurement functions in any of the transactions (App. 49, Stip. 21).

All of the concentrated phosphates purchased by Korea were exported from this country or from other foreign countries to Korea, and were used there. (App. 50, Stip. 24). Such sales were documented as export sales and were recognized as such by the parties involved, including AID (*e.g.*, App. 178, §201.31(e); App. 251-264). CPEA's dealings were with its Korean customer, and it was directly represented in that market by local businessmen and an agronomist (App. 52-53, Stip. 30-33).

OSROK issued the invitations to bid on each of the eleven purchases it made directly; bidders were required to register in Korea pursuant to Korean regulations; and bids were submitted in Seoul (App. 52-53, 220-237). OSROK evaluated all bids, determined the successful bidders, awarded contracts, and opened the necessary letters of credit (App. 238, 241, 246-247, 251 ff.). Suppliers posted performance bonds in Seoul which were payable on OSROK's certification that terms and conditions of the supply contract had not been met (App. 216-217, 264). Shipment was made on OSROK's "call"; OSROK, designated as "buyer," handled the insurance; and any disputes arising from performance under such supply contracts were resolved in Korea (App. 189-200, 214, 219).

In all of the OSROK procurements, dealings and contractual relations between the Korean purchaser, on the one hand, and CPEA and other suppliers, on the other, were precisely the same, whether the transactions were financed by AID, by Korea's own foreign exchange, or by

the special Stabilization Fund (App. 51, Stip. 27, 201-281). Where AID financing was present, however, seller and buyer both undertook the additional obligations imposed on them by the applicable regulations.

In two instances, GSA, rather than OSROK, acted as procurement agency—once in 1963 and once in 1964 (App. 50). The export character of those transactions, however, remained unmistakably clear (App. 303). The commodities were consigned for shipment to OSROK (Ex. 37-38 A, pp. 360-377 A). GSA had neither a beneficial interest in, nor title to, the materials, but acted on behalf of the Korean government, at its request and with its approval (App. 102, ¶ 2; App. 284, Part II; App. 296).

Foreign suppliers were eligible to bid on every one of the Korean tenders and to receive payment in dollars from AID funds if successful (App. 59, Stip. 40). CPEA's foreign competitors did bid on all but two of the thirteen tenders, and one or more of them were awarded supply contracts on eight transactions (App. 327-340).

Where AID financing was used by Korea, AID's regulations (collectively known as Regulation 1) were applicable to require both buyer and seller to submit detailed documentation assuring AID of an opportunity to determine that its loans and grants were not being used wastefully or improperly, but in conformity with the purposes of the foreign assistance program (App. 141-188). The regulations are described as setting forth "requirements for A.I.D. financing" and imposed on Korea responsibility for assuring compliance with their provisions by both importers and suppliers (App. 175, §§ 201.02(a), 201.10).

It is the clear purpose of AID's regulations to determine the terms and conditions under which the agency will finance particular commodity transactions; not to

alter or affect the commercial substance of dealings between supplier and user, and certainly not to transform an export sale into a domestic transaction. "In general, the fact that a particular purchase is to be paid for by ICA will not basically affect the way in which an importer or supplier does business." (App. 146, § 201.2(B))[12]

Thus, Regulation 1, as well as all other pertinent documents, consistently speaks in terms of "A.I.D. financing" (App. 175, § 201.02(b)), eligibility "for financing" (App. 176, § 201.14), "delivery services financed by A.I.D." (App. 179, § 201.32(a)), AID's "methods of financing" (App. 180, § 201.51), "rules and procedures governing transactions to be financed" (App. 134, Part II), "the financing of essential imported goods and services" (App. 118, ¶ D), and so on and on. Moreover, the same regulations uniformly describe the transactions to be financed by AID as "exports" (*e.g.*, App. 183, § 201.63) and require that export licenses be obtained where necessary (App. 178, § 201.31 (e)).

Perhaps the single most important limitation which the regulations impose on buyers and sellers in AID-financed transactions is designed to ensure that cooperating countries will pay no more than the prevailing free market price as established by ordinary competition, whether the sale is financed by grant or by loan. (App. 182-183, Subpart G). Thus, an export sale from the United States (or other supply source) will not be eligible for financing unless the price is no higher than "the market price prevailing in comparable export sales in the United States" or "in com-

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[12] And see, to the same effect, the testimony of John Shute, Chief, Financial and Procurement Methods Division, ICA, *Investigation of Commodity Credit Corporation*, Hearings before House Committee on Government Operations, 85th Cong., 2d Sess. 122 (1958).

parable domestic sales in the United States at the time of purchase . . ." (App. 183, § 201.63(a)). OSROK imposed a similar requirement on its suppliers, even when AID financing was not employed, as in the case of the unchallenged sales made by CPEA and paid for from Korea's own foreign exchange and from the Stabilization Fund grant. (App. 197).

Table 1, reproduced in the Appendix to this brief from defendants' brief below, presents in tabular form the purchasing, supply and financing responsibilities of OSROK, its suppliers and AID.

4. CPEA's Direct Participation in the Korean Market

CPEA was not simply a distant bidder for Korea's fertilizer business, but entered that market in an active and direct manner in order to develop a demand for American-produced concentrated phosphates.[13] To this end, it dealt with the Korean agencies whose responsibility it was to make the basic decisions on grades, quantities and concentrations of phosphate fertilizers to be imported, and carried on an active program to familiarize Korean farmers with the balanced use of phosphate fertilizers (App. 53).[14]

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[13] CPEA was one of the few export associations to perform a wide range of marketing functions, thereby most completely serving the original purpose of the Webb-Pomerene Act. FEDERAL TRADE COMMISSION, ECONOMIC REPORT ON WEBB-POMERENE ASSOCIATIONS 15, 49-50 (1967).

[14] At the time when CPEA first entered the Korean market, agriculturists in that country were largely unfamiliar with the use of phosphate fertilizers, and Korean officials did not even consult with their American counterparts on "the quantities of the various types of fertilizer to be imported and the purpose for which fertilizer was to be used." Report to Congress by the Controller General of the United States, *Examination of Economic and Technical Assistance Program for Korea*, (FY 1957-1961), 108, see also pp. 24, 107, 109.

CPEA established and operated a Korean organization to carry out these efforts, including local business representatives and an agronomist (App. 52-53). Such market development was of vital importance to offset the higher unit costs of concentrated phosphates by educating procurement officials and users in the advantages of a fertilizer with a higher value of plant nutrient per unit. (See *e.g.*, App. 207). In this instance, the association's self-interest coincided with a primary objective of the AID program for East Asia: to concentrate on ways and means for increased food production through the more effective use of fertilizers, insecticides, seeds and arable lands. (See AGENCY FOR INTERNATIONAL DEVELOPMENT, U.S. FOREIGN AID IN EAST ASIA 24, Washington, D.C. (1968); Foreign Assistance Act of 1961, 22 U.S.C. § 2175; the Foreign Assistance Program—AID's Annual Report to Congress, Fiscal Year 1966, at 3).

5. Summary of Korea's Thirteen Phosphate Procurements

The Government's "statement" is concerned almost entirely with matters of procedure, rather than substance, and does not deal with the facts concerning Korea's procurements of concentrated phosphates, nor with the quality and quantity of foreign and domestic competition for Korea's AID-financed business. Taken as a whole, those facts show that there was active and substantial foreign competition in the market; and the Export Trade Act was principally concerned, after all, with such competition. Moreover, at least twenty other American suppliers were active in making one or more bids. All of the contracts won by CPEA were awarded after formal, competitive bidding; all but one of them in competition with foreign concerns. Prices were freely competitive and varied substantially, and their general trend was downwards.

In view of the obvious importance of the facts to this—as to any other—case, we summarize below the principal elements of Korea's thirteen purchases, in chronological order and by tender number.

1847-C: OSROK solicited bids for 70,000 tons of "phosphatic materials" in October of 1961 and actually awarded a contract to supply 96,325 tons.[18] CPEA was the successful bidder, with prices offered in a range from $65.25 a ton to $70.60 a ton for triple superphosphate, and was awarded a contract at $66.47. A European competitor bid on 20,000 tons at $71.00; and three other United States suppliers offered different types of phosphatic fertilizers. (App. 327).

2001-N: In February of 1962, OSROK requested bids on 40,000 tons of triple superphosphate to be financed from the special Stabilization Fund granted to it by the United States in 1961 (p. 6, *supra*). A Tunisian supplier, SIAPE, was the low bidder, with a price of $57.00 for 10,000 tons; another American supplier was high at $78.06; and CPEA offered prices ranging from $58.47 to $61.93. SIAPE was awarded a contract for 10,000 tons; CPEA for 68,516. (App. 328). It would appear that the Government does not dispute that CPEA was engaged in "export trade" on this occasion since AID regulations were not applicable, although Korea used "grant" funds.

2035-N: OSROK offered to buy 50,000 tons of "phosphatic materials" with Korea's own foreign exchange funds in April of 1962. CPEA offered triple superphosphate at

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[18] Although each Korean invitation specified a particular quantity, it also stipulated that the quantity purchased would be determined by the amount of funds available. Accordingly, supply contracts were invariably awarded for different—usually larger—volumes than those announced. (App. 327-340).

prices ranging from $57.77 to $58.60; another U.S. supplier submitted a bid of $55.93; and five foreign suppliers, two from Holland and one each from Portugal, Tunisia and Germany, entered bids at levels from $55.50 to $59.10. In addition, two domestic, and at least two foreign concerns—one from Portugal and at least one from Japan—offered to supply other types of phosphate fertilizers. CPEA received an award of 10,000 tons; 5,000 tons were awarded to another United States concern; and 87,670 tons went to Portuguese, German and Japanese competitors (App. 329). The Government does not challenge CPEA's participation in this tender, since no foreign aid funds were involved.

2075-N: OSROK invited bids in August of 1962 to supply 200,000 tons of triple superphosphate to be purchased with AID-grant funds. On this occasion, CPEA's prices were between $53.30 and $55.20—some three to four dollars a ton less than it had quoted in April of the same year. A Portuguese supplier came in at $52.70, and two U.S. concerns offered $52.05 and $53.53, respectively. CPEA was awarded 149,500 tons; another Florida producer, 30,000 (App. 330).

29247-A & N: In March and April of 1963, GSA acted on behalf of OSROK and requested bids for 36,000 tons of triple superphosphate. CPEA unsuccessfully quoted prices of $55.18 and $53.25. Awards went to suppliers from Tunisia and Portugal, at prices of $49.50 and $50.00, and to two American suppliers at $51.84 and $52.50. Another foreign supplier, specifying Algeria, Morocco or Portugal as his source, was high at $68.00 (App. 331).

3057-N: OSROK invited tenders for 120,000 tons of triple superphosphate in July of 1963. CPEA reduced the

prices at which it had lost the April business and bid from $51.00 to $53.34, with its lowest price quoted on a quantity of 240,000 tons. Eight different suppliers, one of them a foreign concern based in Tunisia, competed on this tender. The Tunisian company quoted its phosphates at from $50.00 to $51.00. Prices of other American bidders varied from $50.35 to $66.61. The Tunisian concern was awarded 30,000 tons; CPEA, 185,200 tons; and other American concerns 26,000 tons (App. 332).

29849-A & N: GSA, for the second and last time, acted for OSROK in March and April of 1964 when it solicited bids for the supply of diammonium phosphate. Bids were submitted by eleven American suppliers and one Mexican company at prices ranging from $81.32 to $120.67. CPEA's price of $86.95 won an award of 92,000 tons, and 20,100 went to other U.S. concerns (App. 333-334).

4050-N: OSROK published invitations to bid on 170,000 tons of triple superphosphate in August of 1964, to which it received responses from two Tunisian, one Mexican and six domestic suppliers, including CPEA. Prices offered ranged from a low of $50.54 to a high of $60.15, with CPEA at $53.96. The association was awarded 136,500 tons at that price; and 12,000 tons went to Swift & Co. at prices ranging from $52.45 to $53.58 (App. 335). In October, OSROK issued a re-tender seeking an additional 10,000 tons on this same procurement. CPEA was low with a bid of $56.51 and was awarded 10,000 tons. Armour & Co. received 19,400 tons at $57.94; and two Tunisian suppliers received a total of 39,600 tons at prices varying from $60.30 to $60.45 (App. 337).

5009-N: A second diammonium phosphate tender issued by OSROK in April of 1965 was the first transaction since

1961 on which CPEA did not face foreign competition, and the second on which it received no award. Prices offered by CPEA and four domestic competitors ranged from a low of $78.64 to a high of $127.86, with CPEA at $84.74, down about $2.00 from its previous, successful bid on this commodity (App. 337).

5066-N: In July of 1965, OSROK requested bids on 150,000 tons of triple superphosphate and made awards on 206,800 tons. Ten suppliers competed for the business, including four from Tunisia, Morocco and Portugal. CPEA's price of $57.80 compared with the low bid of $55.82 and a high of $64.35, and won an award of 153,200 tons. The balance of the contract went to one American and two foreign suppliers (App. 338).

5094-N: OSROK issued invitations to bid on 35,000 tons of triple superphosphate in September of 1965 and awarded contracts to supply a total of 47,590 tons. The eleven bidders included suppliers from Morocco, Tunisia (2) and Portugal and prices ranged from $57.55 to $64.35. CPEA did not participate in this transaction, and the bulk of the tonnage was awarded to Maroc Chimie of Safi, Morocco (App. 339).

6011-N: The last procurement reflected in the record resulted from an invitation issued by OSROK in April of 1966 to bid on 90,000 tons of triple superphosphate. 138,400 tons were awarded on bids submitted by eleven domestic and two foreign competitors, ranging from a low price of $57.99 to a high of $66.15. Although CPEA's price of $59.47 was among the lower offers, it failed to receive any award. 40,000 tons were awarded to a Moroccan supplier whose bid was slightly higher than the association's (App. 340).

6. The Proceedings Below

The United States filed its complaint against CPEA and its member companies on December 21, 1964, alleging that the activities of the association constituted "a continuing agreement, understanding and concert of action among the defendants to allocate business among the defendant producers and to eliminate price competition in sales of concentrated phosphatic fertilizer made pursuant to the United States foreign aid program for Korea" (App. 7). The defendants promptly filed their several answers denying the substantive allegations of the complaint and pleading as affirmative defenses, (a) the Webb-Pomerene Export Trade Act, (b) the fact that the Federal Trade Commission had not exercised its special powers under that Act to investigate, or otherwise to proceed against, CPEA, and (c) the inducement and approval of CPEA's bids and sales by AID and OSROK (App. 10-38).

As modified in the course of the proceedings, the relief sought by the Government below was an injunction against CPEA's continued participation in business "in connection with foreign aid procurements." Just as it has shifted its theories of the case,[18] however, appellant now describes its prayer below as a request for "an injunction against further concerted activity by the defendant firms in connection with foreign aid and *all other transactions*" (GB 11, emphasis added).

After protracted negotiations, the parties stipulated the record on August 19, 1966, and the stipulation was accepted

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[18] While the complaint alleged that Korea's AID-financed purchases were made on a "Buy America" basis, "limited substantially to sources within the United States" (App. 5), it is evident from the stipulated facts that such is not the case and that CPEA faced substantial foreign competition in this, as in all other markets.

by the district court "as the sole and entire record upon which the Court's decision of this case will be rendered" (App. 39).[17]

After briefing, the case was argued before the Honorable Sylvester J. Ryan on March 20, 1967 (App. 1). At that time, in response to questions from the bench, appellant's counsel clarified the record by stating that CPEA was not alleged to have overcharged, or to have engaged in any unreasonable or discriminatory pricing, on any of its sales (App. 342-345).

Before argument of the case below, but after execution of the binding stipulation of facts, AID had announced a revision of its regulations to make export associations dealing in certain commodities, including phosphates, ineligible for participation after January 1, 1967 in AID-financed transactions when procurement sources are limited to the United States.[18] It has been estimated that well over 90% of all foreign aid transactions are now so limited,[19] and consequently, because of the uncertainties and practical implications of the amended regulations, CPEA ceased active

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[17] All formal discovery procedures were obviated by the parties' agreement to stipulate the record, although one of the defendants had promptly noticed the examination of Government officials pursuant to Rule 26, Federal Rules of Civil Procedure. A full trial on the merits was, of course, abandoned by both sides, and numerous areas of factual investigation considered by one or another of the parties to be of significance were set aside by mutual agreement in the course of negotiations extending over a period of eighteen months.

[18] 22 C.F.R. 201.01 (v), 201.52 (a) (7), 201.73, Appendix D; 31 F.R. 16693 (December 30, 1966). A copy of the Federal Register Notice is printed as Appendix A to the Appellees' Motion to Affirm or Dismiss.

[19] Agency for International Development, Operations Report (FY 1967) p. 74. See also *Hearings Before the Subcomm. on Foreign Operations and Related Agencies of the House Comm. on Appropriations*, 89th Cong., 2d Sess., pt. 2, at 9, 1019 (1966).

operations in June of 1967, about three months before the district court's decision.[20] On December 28, 1967, the association was formally dissolved.

On September 11, 1967 the district court handed down its decision dismissing the complaint (App. 1). Judge Ryan, having carefully considered the stipulated facts and the arguments advanced by both sides, reasoned "that the answer lies in the wording of the statute" (App. 349). Pointing out that CPEA sold goods which were concededly "for shipment to the Republic of Korea," that "the commodities were used in Korea," that export associations had sold for many years under various types of foreign aid programs, and that no showing or allegation had been made that CPEA's activities were "unreasonable," (App. 358, 364, 365), Judge Ryan's decision was bottomed on his conclusion that,

> "Much as plaintiff strains at the meaning of the words 'export trade,' we are unable to find any ambiguity in them." (App. 360.)

Introduction and Summary of Argument

The Government's case rests on the thesis that CPEA's bids and AID-financed export sales to the Republic of Korea constituted a *per se* violation of Section 1 of the Sherman Act because the association's prices were determined by its member companies, who were otherwise competing American producers of concentrated phosphates. But CPEA was

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[20] To be sure, AID could rescind its new regulations, but the possibility seems remote and is in any event insufficient reason to rescue the case from mootness. There need be no concern here that a dismissal for mootness would "grant defendants . . . a powerful weapon against public law enforcement." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632.

concededly a properly organized and duly registered Webb Act export trade association.

Section 2 of the Webb-Pomerene Export Trade Act exempts such an association and its members from the prohibitions of the Sherman Act when they are "actually engaged solely in such export trade," and also exempts any "agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association." It is not charged that defendants ran afoul of that proviso or of a second proviso, "that such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein."

Consequently, the sole question for the Court is whether the particular Korean transactions in suit were "export trade" within the meaning of the Webb Act.

That Act's definition of its scope is clear and precise, using language of long-established meaning and common understanding. Since it grants an express, rather than an implied, antitrust exemption, the statute is to be given its plain meaning, so that activities literally covered by the Act may not be read out of its general grant of immunity by means of an artificial or contri ed construction.

The AID-financed Korean trade in concentrated phosphates unquestionably constituted "export trade" from the United States for the American producers, including CPEA,

who received supply contracts. Their sales were export sales, developed by agreements made and acts done "in the course of export trade," as those terms are commonly understood and settled in the law, now as at the time when the Export Trade Act became law. The fact that AID funds financed the trade, and that AID regulations controlled the terms of that financing, do not change the export character of the business.

Appellant can prevail here only if the plain meaning, design and legislative history of the Webb-Pomerene Export Trade Act are rejected. On the other hand, an affirmance of the district court's judgment will, on the facts of the case, be in harmony with that statute and carry out its purpose of promoting more effective competition by American firms for a substantial position in world markets.

The Korean transactions had all the elements of the "export trade" for which Congress fashioned the joint export association as a pro-competitive tool. To the extent that American firms were successful, their sales were undoubtedly exports. The presence of active foreign competition—nowhere mentioned in the Government's brief—meant that a lack of success would result in a loss of markets, and of AID dollars, to foreign nations; and this was precisely the result which Congress intended to minimize by permitting American concerns to achieve an economy of scale by pooling their export resources.

Legislative history and fifty years of practice confirm the plain meaning of the statute. Congress was well aware when it adopted the Export Trade Act that a substantial volume of export trade was, and would continue to be, financed by the United States; and export trade associations have regularly sold their goods to the beneficiaries of foreign assistance programs since immediately after the

First World War. AID has itself circulated a publication encouraging the formation of Webb associations as effective vehicles for participating in the foreign markets which it finances.

Appellant has shifted the emphasis of its case in this Court, now stressing an assertion that was put forward only incidentally below: that CPEA's Korean sales, even though they may be in export trade, are in some fashion a "burden" on the American economy and therefore in conflict with the Webb Act's purposes. This record, however, contains no evidence that defendants' purpose was to "use" the Webb Act in order to take unfair advantage of the foreign aid program; nor is there any evidence whatever that CPEA might have "burdened" that program in fact.

Defendants' cooperative export activities were worldwide in scope and reached many foreign markets, thus carrying out precisely the purposes of the Act. Their particular Korean bids and sales, made in active competition with foreign suppliers, served those same purposes and were at prices conceded to have been reasonable, competitive and non-discriminatory. Moreover, AID itself possessed and exercised broad discretionary powers to guard against any "burdening" of the export transactions it financed.

The Government, lacking any evidence of a "burden" in fact, suggests that *per se* concepts of antitrust illegality be applied in order to reach the desired result of creating some appearance of conflict between CPEA's operations and the intended scope of the Export Trade Act. Such an approach, however, is scarcely instructive when the statute to be construed expressly exempts the challenged activities from the Sherman Act, particularly so where Congress has repeatedly recognized the desirability of cooperation and combination in our foreign trade.

ARGUMENT

POINT I

By Its Clear Language and Plain Meaning, the Webb-Pomerene Export Trade Act Applies on the Agreed-Upon Facts of This Case to Defendants' AID-Financed Korean Sales.

The Export Trade Act uses clear and precise language, with a settled content, in defining the trade and commerce to which it extends; and the Act is to be construed according to the plain meaning of that language. As so interpreted, the statute undoubtedly applies to the AID-financed Korean transactions, since it is stipulated that in each case the commodities sold by CPEA were exported from the United States to the Republic of Korea.

A. The Export Trade Act's Definition of "Export Trade" Is to Be Given Its Plain Meaning

The present provisions of the Webb Act are the result of long and careful deliberation by the 64th and 65th Congresses, following an extensive investigation and voluminous report by the Federal Trade Commission on the desirability of permitting American concerns to cooperate in exporting their products to foreign markets.[21] Particular care was exercised in drafting a precise definition of

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[21] The substance of the law was recommended in the REPORT OF THE FEDERAL TRADE COMMISSION ON COOPERATION IN AMERICAN EXPORT TRADE, 1916. The first bills to implement that recommendation were introduced in the 64th Congress (H.R. 16707, 64th Cong., 1st Sess.; S. 6865, 64th Cong., 1st Sess.), and an extensive series of hearings, debates, Committee reports and amendments ensued before the legislation was finally approved by the Second Session of the 65th Congress on April 10, 1918 (56 CONG. REC. 4999).

"export trade," for that was the heart of the bill and of the debate which surrounded it, and the final result emerged in the following provision:

> "Sec. 1. The words 'export trade' wherever used in this Act mean solely trade or commerce in goods, wares or merchandise exported, or in the course of being exported, from the United States or any territory thereof to any foreign nation; but the words 'export trade' shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any territory thereof, of such goods, wares or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale" (40 Stat. 516, 15 U.S.C. §61).

Congress uses words in the sense of their common and ordinary meaning. *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687; *United States* v. *Cooper Corp.*, 312 U.S. 600, 606. In 1918, as now, an "export" was commonly understood and invariably defined in terms of its final resting place, that is, a commodity which is sent abroad, "especially to foreign countries." [22]

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[22] WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Reference History ed., 1916). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) defines the verb as, "to carry or send a commodity to some other country." See HENIUS, DICTIONARY OF FOREIGN TRADE (1946): ". . . [Export] . . . has come to mean both the articles that are exported and the transaction, that is, the act of sending them out of a country. It serves, thus, both as a verb and as a noun. The exports of a country are the goods and products that it sends abroad." Official Government statistical reports define exports as, "the physical movement of merchandise out of the United States customs area to foreign countries, *without regard to the method of financing*. . . ." U. S. BUREAU OF THE CENSUS, UNITED STATES EXPORT STATISTICS, REPORT FT 410, at 1, (August, 1963) emphasis added.

"Export," and its variations, had been employed by Congress long before passage of the Export Trade Act, as in "drawback" provisions of the Tariff Acts (19 U.S.C. §1313), and its meaning had been settled by this Court well before 1918:

> "Whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country. 'As the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other' [citation omitted]. *Swan & Finch Co.* v. *United States,* 190 U.S. 143, 144-45.

That definition has been followed consistently. *Thames & Mersey Insurance Co.* v. *United States,* 237 U.S. 19; *A. G. Spalding & Bros.* v. *Edwards,* 262 U.S. 66; *Richfield Oil Corp.* v. *State Board,* 329 U.S. 69.

Since the Webb-Pomerene Export Trade Act defines "export trade" in such clear and unmistakable terms, employing words in their ordinary sense which have a settled legal content, it is to be applied according to its plain meaning. *Helvering* v. *City Bank Co.,* 296 U.S. 85, 89; *Flora* v. *United States,* 357 U.S. 63, 69, 72, *aff'd on rehearing,* 362 U.S. 145; *United States* v. *Oregon,* 366 U.S. 643, 648. "There is nothing to construe." *Van Camp & Sons Company* v. *American Can Company,* 278 U.S. 245, 253. If the result of that plain meaning be thought unfortunate or mistaken by some, it is one "which Congress, having made, can refashion." *Unexcelled Chemical Corp.* v. *United States,* 345 U.S. 59, 66. See also *Palmer* v. *Massachusetts,* 308 U.S.

79, 83; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79.

Appellant urges that Webb-Pomerene be read with little attention to its plain meaning and purports to perceive in this Court's decisions a principle that "exception[s] to the antitrust laws . . . are narrowly construed . . ." (GB 19). That principle, however, has no relevance to *express* exemptions from the Sherman Act, but only to those which are sought to be *implied* from a general statutory scheme. *Cf. United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351, where the Court contrasted the lack of immunity conferred by the Bank Merger Act with "the express exemption provisions" of, among others, the Webb Act.

B. CPEA's AID-Financed Korean Transactions Were "Export Trade" as Defined by the Export Trade Act.

It is undisputed that the concentrated phosphates bid and sold by CPEA on the particular transactions challenged here were exported from the United States to the Republic of Korea: they were sold from Florida plants and loaded on ships in Florida seaports "for shipment to the Republic of Korea," procured by or for Korea, and finally used and totally consumed in Korea. (App. 42, 46, 48; Stip. 1, 14, 20). They had all the characteristics of exports: contract and shipping documents which in every instance made clear and unequivocal their foreign destination and the identity of the foreign consumer (App. 51, Stip. 26; App. 251-281); none of the goods sold was marketed or consumed in the United States, but all were shipped directly from producer to Korea (App. 46, 48, 51; Stip. 14, 20, 26).[23]

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[23] At one place in its brief (GB 21-22), the Government comes perilously close to suggesting that AID-financed exports may not be "trade or commerce" at all. If that were to be so, however, it would appear to follow that they are not "trade or commerce" for Sherman Act purposes either.

In all but two instances,[24] CPEA's bids were submitted directly to, and evaluated and determined by, the Korean purchasing agency, which itself awarded contracts, opened letters of credit, handled all disputes and negotiations relating to contract performance, assumed all contractual obligations of the buyer, took title and assumed risk of loss. (App. 53, Stip. 33-34; App. 189-200, 238-239, 251-254, 255, 273). In two instances when GSA acted as procurement agent for Korea, it was OSROK which initiated the transactions and specified the amount and type of phosphates to be purchased (App. 51-52, Stip. 28; App. 293-295), and GSA's handling of the procurement formalities was at Korea's request and on her authorization and behalf. (App. 102, ¶2; App. 51-52, Stip. 28; App. 293, 296) At all stages of these two transactions, it was established and recognized by all concerned that the commodities were destined for Korea and for export to OSROK. (Ex. 34, pp. 336-337; Ex. 35-36, pp. 339-359; Ex. 37, pp. 361-367; Ex. 39, p. 379)[25]

Appellant urges the Court to brush aside facts showing the clear export nature and substance of these transactions on the ground that, "Concepts of private contract law must give way before federal antitrust policy" (GB 24), citing *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 18 and *United States* v. *Masonite Corp.*, 316 U.S. 265, 276-277. The question in this case, however, does not turn on a clash between private contract and antitrust law, but on whether the pro-

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[24] Korea purchased a total of $48.1 million in concentrated phosphates from CPEA. According to the Government's calculations (GB 6-8), $40 million was handled directly by OSROK and $8 million was procured for Korea by GSA.

[25] Although GSA acted as procurement agency on these two transactions, OSROK took title and bore the risk of loss as AID's "designee." (App. 290; Ex. 37, pp. 364-367)

visions of the Export Trade Act "must give way" to a federal antitrust policy to which they are, and are intended to be, an express exception. Section 2 of the Webb Act is *intended* to permit acts to be done through joint associations which might otherwise be unreasonable restraints of trade in violation of the Sherman Act. See, S. REP. No. 1056, 64th Cong., 2d Sess. 2-3 (1917). To state the question in other terms, it is not whether—as in *Simpson* and *Masonite*—a questioned practice violates the Sherman Act; but whether the Sherman Act applies at all. This can be determined only by looking at the stipulated facts which show beyond dispute that defendants' concentrated phosphates were "exported" to Korea.

The fact that United States foreign aid funds were used by Korea would seem clearly immaterial to a determination of whether "export trade" were involved. As the Government itself concedes (GB 18), the Webb Act Congress recognized that export associations might sell to foreign customers using United States foreign aid loans and that the purchasing power of such funds might thereby be reduced. The Act nevertheless was passed; and any apprehensions that export associations might "frustrate" programs of foreign assistance were obviated many years later by the adoption of AID's comprehensive Regulation 1 to protect those programs against anti-competitive pricing and other burdens.

Nor is the alleged distinction between grants and loans of significance here—except to the extent that it emphasizes the importance of effective competition against foreign suppliers for grant-financed export business—since one of the Korean sales by CPEA which the Government does not challenge was financed by a special fund granted by the United States to Korea without even the supervisory effect

of AID's regulations. (App. 51; Stip. 25; GB 6, f.n. 5). The AID regulations themselves do not recognize any distinction between "grant" financing and "loan" financing.

AID undoubtedly had a special responsibility for the integrity and efficient use of the financial assistance it administered. That responsibility, however, was a financial one—"that of an investment banker"—and did not change the substance or the nature of export sales which were assisted by its dollar funds. *United States* v. *Standard Oil Co. of California*, 155 F.Supp. 121, 124-125 (S.D.N.Y. 1957), *aff'd*, 270 F.2d 50 (2d Cir. 1959).

AID's regulations and documents, and the statements of its officials, have invariably described the agency's role as "financing" and the transactions which it financed, such as those in issue here, as "exports."[28] It has been stipulated that AID did not purchase concentrated phosphates for Korea. (App. 49, Stip. 21 and, *e.g.*, App. 175, 180, §§ 201.10, 201.51). As Judge Ryan found at the conclusion of the proceedings below, "It is plain from the stipulated facts and from the very raison d'etre of the foreign aid program that the 'cooperating country' and not the United States is the purchaser" (273 F.Supp. at 271; App. 358). The basic economic theory of the foreign assistance program is to make

[28] In addition to the facts and materials already cited at pages 12 to 16, *supra*, see *Hearings on H.R. 15263 Before the House Committee on Foreign Affairs*, 90th Cong., 2d Sess., pt. I-VI (1968) in which AID officials regularly describe their agency's function as "financing exports" (*e.g.*, at page 198, "in fiscal year 1967, the AID program financed the export of $109 million worth of fertilizer.") At related hearings before the Senate Committee on Foreign Relations, AID's Administrator disclaimed responsibility for possible mis-use in the handling of AID-financed goods abroad on the ground that: "They are not our goods. We, like a bank, have financed the purchase of the goods, but they have been shipped by the American supplier to the Brazilian importer. . . ." *Hearings on S. 3091 Before the Senate Committee on Foreign Relations*, 90th Cong., 2d Sess., pt. 2 at 316 (1968).

purchasing power, in the form of foreign exchange costs, available to such nations as the Republic of Korea.

Even where, as in other types of transactions, the United States *is* the purchaser of goods certainly destined for shipment abroad, and even though no foreign consumer be involved, the purchase and sale is nevertheless an export for the purpose of determining whether a state sales tax may be applied. *Union Oil Co.* v. *City of Los Angeles*, 227 Cal. App. 2d 608, 38 Cal. Rep. 923, 926 (D. Ct. App. 1964), *cert. denied*, 379 U.S. 972.

Congress went to some lengths in the Export Trade Act to make clear that the exemption extended even to sales which were entirely consummated within the United States, so long as the ultimate foreign destination of the merchandise is certain. A preliminary version of the bill had provided that "'export trade' shall not be deemed to include . . . trading in or marketing within the United States. . ." 53 CONG. REC. 13706 (1916). At the urging of the Federal Trade Commission, "selling for consumption" was substituted for "trading in or marketing," the Senate Committee report pointing out:

> "We desire, of course, to authorize associations for the sole purpose of selling abroad. In order to do this, they must have the right to acquire or buy, within the United States, and *the right to sell within the United States for the foreign market*, but in view of the settled domestic policy of the United States under the Sherman law, clearly these associations should not be permitted to organize for the purpose of making sales abroad and use their organizations to sell for consumption within the United States." S. REP. No. 1056, 64th Cong., 2d Sess. 2 (1917), emphasis added.

Consequently, it has long been understood that an "export" for Webb Act purposes is, as in all other cases, a sale made with the certainty of a foreign destination." Accordingly, whether Korea was the purchaser, as Judge Ryan found, or whether the United States might be deemed the purchaser under some circumstances, as the Government contends, it is clear under the long-understood definition of "export" that the sale of goods to Korea by CPEA constituted "export trade" within the meaning of the Export Trade Act.

" The Webb-Pomerene immunity applies even to an export association whose principal business is in sales within the United States to other domestic concerns which perform the actual export function. See *Matter of Douglas Fir Exploitation and Export Co.*, FTC Dkt. No. 880, *dismissed*, 8 F.T.C. 526. The Chief of the Commission's Division of Export Trade testified in 1950 that, "Under the Webb Act it has always been assumed that all transactions within the United States which resulted in the movement of goods earmarked for export from a domestic point of origin to a port of exportation took place 'in the course of export trade,' even though such transactions were consummated between two American parties within the United States. This interpretation follows court decisions which have held that goods destined for exportation to a foreign country are in foreign commerce from the time of delivery to the carrier at an inland point." *Hearings on H.R. 6879 Before the Subcommittee on Monopoly Power of the House Judiciary Committee*, 81st Cong., 2d Sess., ser. 14, pt. 3 at 120 (1950). (Remarks of Allen C. Phelps).

POINT II

On the Agreed-Upon Facts of This Case It Is Evident That CPEA's Activities Furthered the Purposes of the Webb-Pomerene Export Trade Act and Were Consistent With Settled Practice and Understanding.

Congress designed the Export Trade Act, in the light of world trade circumstances not so very different from those which obtain today, as an instrument of policy to promote competition with foreign merchants and encourage expansion of American exports by permitting American producers to combine their activities in order to achieve economies of scale and greater competitive strength. CPEA's operations, world-wide and in Korea, served these purposes, observed both the letter and the spirit of the statute, and were in full accord with the long-settled understanding that foreign aid-financed export sales by export trade associations are entirely permissible.

A. Legislative History and Purpose

The Webb-Pomerene Export Trade Act became law at a time when Congress was as firmly committed to principles of free and fair competition as it is today. The Federal Trade Commission Act (38 Stat. 717) and Clayton Act (38 Stat. 730) had been adopted only two years before the bill was introduced; and the Wilson Tariff Act had recently been strengthened (37 Stat. 667). The Antidumping provisions of the Revenue Act of 1916 (39 Stat. 798) and the Shipping Act (39 Stat. 728) were fresh additions to the statute books.

Congress was at the time very much concerned with the country's role in world trade after World War I, when re-

vitalized European countries would likely resume their commanding positions in the world's export markets.[28] The demands of the domestic market overshadowed the opportunities of the export market for United States producers, and in the years immediately prior to World War I a substantial volume of world trade had been lost to other countries whose export efforts were more highly organized and less inhibited by the uncertainties of domestic antitrust policy.

The importance of the matter was such that the first Congressional assignment to the newly-created Federal Trade Commission was to undertake an investigation of export trade and to recommend a course of action to improve the competitive abilities of American companies in the coming struggle for overseas markets. The Commission promptly did so, and in 1916 submitted to Congress a comprehensive Report, the principal findings of which were,

> "(1) That other nations have marked advantages in foreign trade from superior facilities and more effective organizations.
>
> "(2) That doubt and fear as to legal restrictions prevent Americans from developing equally effective organizations for over-seas business and that the foreign trade of American manufacturers and producers, particularly the smaller concerns, suffers in consequence."[29]

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[28] See *e.g.*, exchange between Senators Pomerene and Cummins at 56 Cong. Rec. 70 (1917).

[29] Federal Trade Commission, Report on Cooperation in American Export Trade, 3 (1916).

As a possible solution to the problems it had identified, the Commission recommended legislation which, with appropriate safeguards, would permit American producers to combine their export marketing efforts so that ". . . . they can share the cost of developing new markets, establish themselves firmly, extend credit more readily to foreign customers, and compete more successfully with foreign syndicates and cartels." [30] A bill embodying the Commission's recommendations was introduced by Senator Pomerene and Congressman Webb and attracted the support of President Wilson and a number of industry representatives. After extensive consideration and amendment in the course of hearings and debates during 1916, 1917 and 1918, the present statute became law on April 10, 1918 as "An Act to Promote Export Trade and for Other Purposes." [31]

In view of the possible danger that combinations formed for export purposes might, if permitted, operate to restrain domestic competition, a focal point of the Congressional debates was the necessity of distinguishing in a clear and practical manner between domestic and export trade.[32] The distinction was finally drawn in a clear and concise definition using language ("export trade") with a settled meaning and in addition incorporating specific provisos to assure that export associations would not operate to the detriment of domestic competition. Proponents of the bill did "not see how it is possible to more accurately confine the bill

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[30] *Ibid.*, p. 8.

[31] See, TEMPORARY NATIONAL ECONOMIC COMMITTEE, INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, Monograph No. 6, at 118-119 (1940).

[32] *E.g.*, 55 CONG. REC. 3570; 55 CONG. REC. 3580; 56 CONG. REC. 170; H. R. REP. No. 50, 65th Cong., 1st Sess. 2 (1916); S. REP. No. 109, 65th Cong., 1st Sess. (1917).

to purely export trade than is done in this . . . [definition]".[33]

The legislative history of the Export Trade Act is therefore clear that Congress intended to exempt export associations from the prohibitions of the Sherman Act, so long as they did not abuse their powers to restrain domestic trade. Congress established shipment abroad for foreign consumption as the test of "export trade."

It is equally clear that the 65th Congress was well aware of the likelihood that export associations would sell in export markets supported by the credit and the purchasing power of the United States. The Government concedes as much (GB 18), but then seeks refuge in the fact that the Korean transactions in suit here were financed by grants, while most foreign assistance in 1918 was characterized by loans. The significance of the difference is immaterial on the facts of this case, particularly so since the major portion of current foreign aid is on a loan basis (Agency for International Development, Facts about the Foreign Aid Program for FY 1968, at 13 (1967)) and since one of the concededly lawful Korean transactions was also financed by grant funds (App. 51; Stip. 25). In any event, the difference between loans and grants does not appear to have been viewed as a material one by the Congress which enacted the Webb Act. In debates over the appropriation of billions of dollars for foreign economic assistance in 1917-19,[34] and the issuance of bonds to support that program, considerable attention was given to the

[33] Remarks of Senator Kellogg, 56 CONG. REC. 111 (1917); Remarks of Senator Cummins, 56 CONG. REC. 173 (1917). It is stipulated here that defendants have not violated any of Webb-Pomerene's provisos. (App. 42, 45; Stip. 1, 12)

[34] See, 40 Stat. 35 (1917); 40 Stat. 288 (1917); 40 Stat. 502 (1918); 40 Stat. 1309 (1919).

question of whether such assistance should not be granted outright without any obligation to repay. Remarks of Senator Cummins, 55 CONG. REC. 757 (1917); Senator Kenyon, *id.* at 760; Mr. Moore, *id.* at 671; Mr. LaGuardia, *id.* at 676; Mr. Mondell, 56 CONG. REC. 4337 (1918); Messrs. Sloan and Moore, 57 CONG. REC. 4282 (1919). While this view did not prevail at the time,[35] there were few illusions as to the strength of the receivables created by foreign assistance loans, and it was recognized that a paramount interest should be to utilize the credit extended abroad to stimulate American exports and thus retain the dollars loaned in the United States to the greatest extent possible.[36]

B. CPEA has Competed in World Markets, Including Korea, in the Spirit and According to the Letter, of the Export Trade Act

It cannot be doubted on this record that CPEA served as an effective instrument for carrying out the Webb Act's design of encouraging competitive expansion of American export trade through combination and cooperation in making export sales. The association was actively engaged in substantial, world-wide competition with a number of powerful foreign suppliers, some of them affiliated and some of them partly owned or controlled by foreign governments (App. 59-60; Stip. 40-41). In the face of such competition, the cooperative endeavors made possible by CPEA's organi-

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[35] The decision at the time to extend economic assistance on a "loan" basis was at least partly due to a consideration for the national "pride" of recipient nations. The government of France went so far as to request that a bill for grant aid to that country not even be debated by Congress. BROWN & OPIE, AMERICAN FOREIGN ASSISTANCE, The Brookings Institution 2 (1953).

[36] Remarks of Senator Thomas, 55 CONG. REC. 753 (1917), and Senator Stone, *id.* at 7121.

zation and operation succeeded, in a span of about six years, in marketing American-produced fertilizer chemicals in thirty-nine foreign countries. (App. 45-46, Stip. 13). The lawfulness of the vast majority of those sales in number, accounting for about 50% of CPEA's volume, is not disputed. (App. 42, 45, 46, 54; Stip. 1, 12, 13, 35-36)

CPEA was an active, going concern, and not simply a vehicle for the setting of prices and allocation of business. It promoted its products, developed markets, negotiated and made sales, and generally attempted to and did sell American phosphates wherever demand existed or could be created. (App. 42-43, 45-46, 52-53, Stip. 2, 13, 30-32). If such an organization is to operate successfully, the legality of its efforts to penetrate foreign markets cannot be made dependent on such uncertain and temporary circumstances as the presence and terms of United States foreign assistance in particular markets where demand exists.

CPEA's efforts in making Korean sales were similarly consistent with the spirit, purposes and requirements of the Webb-Pomerene Export Trade Act. Those efforts were wholly unrelated to, and are not claimed to have had any effect upon, domestic trade.[37] The export character of the transactions is most clearly reflected in the stipulations that "AID did not itself procure any concentrated phosphates" and, in a paraphrase of one of the Webb Act's provisos, that "foreign aid funds have not been used to procure commodities for use or resale in the United States." (App. 48, 49, Stip. 20, 21) It has always been evident—

[37] The Webb-Pomerene Congress, however, recognized and accepted that, "any sales in foreign commerce may incidentally and temporarily result in the increase in prices of the same articles to home consumers . . ." S. Rep. 1056, 64th Cong., 2d Sess. 3 (1917). This belies the Government's argument that Congress contemplated the effects of an export association's activities would be "exclusively in foreign markets and upon goods sold abroad" (GB 22).

to defendants, the Federal Trade Commission, AID, GSA and the Korean government—that, by any standard or custom of the trade, defendants were engaged in export trade when they sold concentrated phosphates to Korea. All the evidence in the record is consistent with that view. Questions of financing aside, the Korean transactions were precisely the type of trade which the Webb Act was fashioned to encourage: shipments to foreign countries of goods produced in the United States.

Moreover, as the stipulation of facts makes clear, CPEA's principal involvement on the transactions in question was directly in and with Korea. Its representatives were active in that country to promote phosphates directly to farmers, agricultural schools and procurement agencies; to consult with Korean government officials and agricultural experts about fertilizer use and to gather information about the market; to make the actual sale by preparing and submitting competitive bids, posting performance bonds, and attending bid openings; and to arrange shipping schedules, supervise unloading and, if necessary, handle disputes over contract performance and terms. (App. 52-53, Stip. 30-32).

In short, the association's efforts in Korea contributed in an important fashion to the establishment of a permanent market position for American commodities and stimulation of long-term demand for them; and that is what Webb-Pomerene is all about. AID's own activities, essentially financial in nature, did not supplant the need for, or the importance of, CPEA's Korean operations. It is stipulated here that Korean agencies decided which types, grades and concentrations of phosphate fertilizers should be procured by that country (App. 53, Stip. 34), so that CPEA's market-development activities were essential to maintain a place in Korea's planning for its products.

Moreover, and of critical importance to the ultimate issue in this case, are the facts showing the presence of substantial foreign competition for Korea's AID-financed business. (App. 53, 59-60, Stip. 34, 40; App. 327-340) Where such competition exists, particularly in markets financed by dollar credits, there is surely the kind of export trade directly contemplated by the sponsors of the Export Trade Act whose primary purpose was to encourage more effective competitive efforts against foreign traders through cooperation among American exporters.

Thus, CPEA was carrying on normal export business with Korea, as an integral part of its world-wide operations, in a manner completely consistent with the intent and requirements of the Export Trade Act; and its activities in Korea concretely affirm the existence of export market problems which concerned the 65th Congress. American producers were for the most part preoccupied with the domestic market, and the planning, continuity and stimulus of an association solely devoted to export trade was necessary to turn their attention abroad in an organized fashion. To market phosphates in Korea against substantial foreign competition, the economies achievable through a cooperative enterprise were necessary to overcome the disadvantages of a product which was new to the market and of costly long-distance shipping of bulk materials to a market in which purchasing decisions were not made in a freely competitive manner.[25] Cost efficiencies were critical to success under these circumstances, and duplicate marketing facilities on any significant scale were not feasible, particularly since future demand for American-produced phosphates would be substantially affected by the construction

[25] Report to Congress by the Controller General of the United States, *Examination of Economic and Technical Assistance Program for Korea*, (FY 1957-1961), pp. 84-87, 95, 98, 107-111.

of new fertilizer plants in Korea, two of them financed by AID (App. 61, Stip. 43). The Government's assertion (GB 17) that the "raison d'etre of the Webb-Pomerene Act has no applicability to transactions which are paid for by the United States" seems palpably illogical, and inconsistent with the legislative history and purposes of the Act, when one takes into proper account the presence here of foreign competitors whose Korean sales were also financed by AID grants. Indeed, the "raison d'etre" of Webb-Pomerene is peculiarly applicable on the facts of this case in order to encourage the effective competition of American producers so that the grant dollars might remain in this country rather than becoming a part of the gold outflow to foreign nations.

CPEA's efforts—world-wide and in Korea—have played a large part in encouraging exports of American phosphates and consequently have been completely consistent with the public purpose embodied in the Export Trade Act.

C. Long-Standing Practice Confirms That CPEA's AID-Financed Export Sales Were Export Trade Within the Webb-Pomerene Export Trade Act

Since their very beginnings, export associations operating within the exemption of the Webb Act have sold their products abroad under various United States foreign assistance programs, and from time to time have been encouraged by Government agencies to do so. Indeed, some of the first such associations "were organized for the purpose of selling goods to the Allies during the World War." [39]

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[39] TEMPORARY NATIONAL ECONOMIC COMMISSION, INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, Monograph No. 6, at 133 (1940). The same monograph notes (at page 146) that export associations were used "also for the disposition of surplus war stocks after the armistice."

One of the first known Webb-Pomerene groups, the Millers Export Association, was organized in 1918 and, until some time in 1920, acted as agent for United States producers of foodstuffs in selling to Allied countries through the Food Administration Grain Corporation and its successor, the U.S. Grain Corporation, both Government agencies.[40] This foreign assistance program had been authorized by Congress in 1917 and implemented by executive order in the same year. During the debates on Webb-Pomerene it was recognized that grain producers would likely organize an export association to take advantage of the program.[41]

The Grain Corporation acted as a central selling agency, among other things, for grain procured by Allied governments, and it controlled all exports of the commodities with which it was concerned. Later, after the armistice, it expanded its operations and was responsible for the distribution of foodstuffs in relief of Europe. It has been reported that the Grain Corporation distributed or sold abroad about $3.3 billion of American foodstuffs, and that, of the total, $2.4 billion was sold on credit, about $325 million was given away as charity, and the balance paid for in goods, gold or services. The financing of these exports was, of course, a critical problem, and it was solved by the extension of American credit—in the form of grants, as well as loans (40 Stat. 1161 (1919)).[42]

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[40] FEDERAL TRADE COMMISSION, FOREIGN TRADE SERIES No. 2, pp. 6-7 (1935); FEDERAL TRADE COMMISSION, REPORT ON COMMERCIAL WHEAT FLOUR MILLING, 41 (1920).

[41] See Remarks at 55 CONG. REC. 2788-2789 (1917).

[42] SURFACE, THE GRAIN TRADE DURING THE WORLD WAR, Macmillan Co., 169, 398-442 (1928); SURFACE & BLAND, AMERICAN FOOD IN THE WORLD WAR AND RECONSTRUCTION PERIOD, Stanford Univ. Press, 15-21, 31-50, 73-88, 113-116 (1931); BANE & LUTZ, ORGANIZATION OF AMERICAN RELIEF IN EUROPE, 1918-1919, Stanford Univ. Press, 1-6, 10 (1943).

In more recent times, export associations sold under World War II Lend-Lease programs, in which procurement was handled by the United States Treasury Department. (App. 52, Stip. 29; see, *Matter of Carbon Black Export, Inc.*, 46 F.T.C. 1244, 1390-91 (1949)).

Following World War II, Webb associations continued to be active in making export sales, and the Federal Trade Commission's 1950 Annual Report, in describing the activities of export associations, noted that some sales were directly attributable to the use of U.S. foreign aid financing to offset the loss of purchasing power resulting from a dollar shortage and devaluation of foreign currencies. The Motion Picture Export Association sent films abroad under the Marshall Plan (ECA) and was paid in dollars, by ECA for its exports to Germany and by the United States Army for Japan.[43] Indeed, ECA actively encouraged association under the Export Trade Act as an efficient way of developing sales to the export markets it financed.[44]

When ICA (AID's immediate predecessor) succeeded ECA, export associations continued to make sales financed by the United States, and continued to be encouraged to do so. (App. 52, Stip. 29). ICA, which was sensitive to considerations of antitrust policy when applicable,[45] published and circulated a "Small Business Memo" which extolled the advantages of export associations as one method for participating in ICA-financed export sales (App. 318-325). The document points out that,

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[43] *Hearings on H.R. 6679 Before the Subcommittee on Monopoly Power of the House Judiciary Committee*, 81st Cong., 1st Sess., ser. 14, part 2A, at 660 (1949).

[44] *Ibid.*, Part 3, at 141-142.

[45] BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD, McGraw-Hill, 459-473 (1958).

> "The associations operating under this law [Webb Act] have achieved many advantages in their efforts to build up a profitable export trade, among which are agreements upon price and terms of sale to foreign buyers, the centralizing of sales efforts or the setting up of a joint sales organization, thus making possible economies in sales costs, . . ." etc. (App. 320-321).

This Memo evidently continued to be circulated by AID, at least until the change in regulations late in 1966. Webb-Pomerene associations other than CPEA are currently making export sales under the foreign aid program,[46] as well as under the administration of Public Law 480, in which United States funds are used to finance the export of agricultural products. (App. 52, Stip. 29).

Turning finally to the Korean assistance program, and to the particular transactions in suit, it is stipulated that officials of AID, GSA and OSROK were at all times aware of CPEA's status as an export association and yet invited the association to compete on each of those transactions. (App. 53, Stip. 33). Moreover, the Federal Trade Commission was fully advised of all CPEA activities, including its AID-financed sales. (App. 45, Stip. 12).[47]

Under these circumstances, where responsible and concerned Government agencies have over a considerable pe-

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[46] This despite the fact that AID holds itself out as possessing the power to disqualify export associations from making AID-financed sales, where it is thought appropriate to do so. 31 Fed. Reg. 14079 (November 3, 1966) and 16693 (December 30, 1966).

[47] The Commission has recently re-evaluated the Webb-Pomerene Act and has recommended certain modifications and clarifications. Its report is notably silent on the question of whether any change should be made to deal with foreign aid-financed sales by export trade associations. THE FEDERAL TRADE COMMISSION, ECONOMIC REPORT ON WEBB-POMERENE ASSOCIATIONS 67-70 (1967).

riod of time permitted, and in fact encouraged, the very practices now under attack, there is the persuasive evidence of usage that the purposes and limitations which appellant now seeks to attribute to the Export Trade Act are lacking in any real substance. *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 524-525; *Zemel* v. *Rusk*, 381 U.S. 1; *United States* v. *Cooper Corp.*, 312 U.S. 600.[48]

If, in fact, Congress had not intended the Webb Act to have its plain meaning, as confirmed by fifty years of administrative practice and industry understanding, it would have been an easy matter for it to seize upon its many opportunities to set the matter straight. It has long been aware (pages 40, 46-47, *supra*) that export associations have regularly sold in the foreign aid program, and yet has repeatedly emphasized its wish that such program "shall, to the maximum extent consistent with the accomplishment of the purposes of this title, utilize private channels of trade." Economic Cooperation Act of 1948, §112(h) (62 Stat. 137, 148). Congress has reviewed the foreign aid program annually and, on a number of occasions over the years, has reviewed the Webb Act in hearings at which Department of Justice spokesmen regularly recommend its amendment or outright repeal.[49]

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[48] In an earlier case involving one of AID's predecessors, the Second Circuit Court of Appeals noted that, ". . . the best interpretation of the mutual contemporaneous understanding of the parties under which the defendants made and ECA financed crude oil sales is to be found in their words and their acts." *United States* v. *Standard Oil Co. of California*, 155 F.Supp. 121 (S.D.N.Y.), *aff'd*, 270 F.2d 50, 58 (2d Cir. 1959).

[49] See, *e.g.*, *Hearings on H.R. 6679 Before the Antitrust and Monopoly Subcommittee of the Senate Committee on the Judiciary*, 81st Cong., 2nd Sess., ser. 14, pt. 3, at 172-188 (1950); *Hearings Pursuant to S. Res. 26 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 126 (1967).

D. Appellant's Labored Interpretation of the Export Trade Act Would Introduce Uncertainty and Confusion to an Area Where Congress Intended None to Exist

An important purpose of the Export Trade Act was to remove doubt and uncertainty as to whether, and, if so, to what extent, the Sherman Act's prohibitions applied to cooperative export selling efforts among American producers. H.R. Rep. No. 50, 65th Cong., 1st Sess., 2 (1917). In its grant of immunity to such efforts, Congress spelled out a clear and definite qualifying test by the plain meaning of its definition of export trade.[50]

Appellant's artificial construction of the statute—which is in any event unrelated to the facts—would defeat that purpose. While the Government argues at some length from theoretical and policy considerations that CPEA's Korean sales were not "export trade," it never really comes to grips with the problem of determining what else those sales might be.[51] Nor is the Government at all precise as to the substance and meaning of the tests it would apply to this matter.

The distinction between grants and loans cannot be determinative, for the Stabilization Fund purchase, which is

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[50] "The export trade of the United States is the foreign trade of the United States. To export commodities means to sell them and transport them to some other country in the world. That is our foreign trade, and this bill nullifies the antitrust laws so far as export trade is concerned." Remarks of Senator Cummins, 56 Cong. Rec. 173 (1918).

[51] Since the commodities sold were shipped directly from Florida plants to Korea, they must be viewed as "trade or commerce . . . with foreign nations" for the Sherman Act to have any applicability here at all. (It is stipulated that the goods were not sold for use, consumption or resale in the United States. App. 48, Stip. 20). At least as a matter of logical analysis, it would seem to follow from the very grounds on which the Government asserts a cause of action that CPEA's sales necessarily fall within Webb-Pomerene's definition of "export trade."

conceded to have been a lawful transaction, was also based on a grant of economic assistance. Moreover, the determination of whether foreign aid is to be granted or loaned is one made by the governments involved, is generally not disclosed to American exporters, and in any event the aid extended to a particular country, including Korea, is normally a mixed "package" of grants and loans.

Nor is the fact of AID financing, coupled with AID regulation, the test sought to be applied. It is stipulated that CPEA sold to AID-financed customers other than Korea in transactions subject to AID regulations (App. 54, Stip. 36), but the Government does not now dispute the legality of those sales. (App. 42, 45, Stip. 1, 12)[52]

Congress has provided a plain and precise test for the Export Trade Act exemption, and CPEA has plainly met it. If the Government believes that a change is desirable, its recourse is to Congress.[53]

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[52] The Government cannot now alter its stipulations and concessions to fit the theories it intends to advance. Stipulations are favored by the courts, *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F.2d 380, 384 (6th Cir.), *cert. denied*, 320 U.S. 740; and grounds advanced for the first time in this Court will not be considered when they "are not open on the record," *Delgadillo* v. *Carmichael*, 332 U.S. 388, 391. At the same time, all legitimate inferences may be drawn from an agreed statement of facts, and considered, since they are in legal effect a part of the facts agreed. *Federal Trade Comm'n* v. *Pacific States Paper Trade Ass'n*, 273 U.S. 52, 61.

[53] In view of ". . . the new American stake in world resources and the world's standard of living . . . the encouragement of foreign business [is] a matter of public as well as purely private importance. As in any area where stimulation of useful private activity is in the public interest, it is important to confine the shadows of legal risk as closely as possible to the substance of the harms sought to be prohibited, lest the useful be deterred along with the harmful." BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD, McGraw-Hill, 11 (1958).

POINT III

Appellant's "Burden" Theory Is Not Supported by the Record and Is Contrary to the Law and the Stipulated Facts.

A consistent theme of appellant's brief (GB. 13, 14, 19, 24) suggests that CPEA's Korean sales activities somehow "burdened" the foreign aid program and the American economy. This stipulated record, however, cannot support the argument as a matter of fact;[54] and, as a matter of law, the government's position, as the District Court observed, is "ingenious" but *"a posteriori."* (App. 348, 360).

Indeed, the argument is surprising in a way, since government counsel in the proceedings below candidly informed the court that no charge was made of unreasonable or discriminatory pricing by the defendants. (App. 342-345).

A. There Was in Fact No Burden, and the Record Contains No Evidence of Any Unreasonable Restraints Resulting From CPEA's Operations

Korea's AID-financed purchases of concentrated phosphates were made in a competitive market and at competi-

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[54] Whether the activities of export associations may burden or advance the United States Foreign Assistance program is a question of policy and of economic consequence which is an inappropriate basis for litigation, particularly when the record of the case is as limited as it is here. Indeed, the government's failure to present direct evidence of any burden *in fact,* coupled with the concession that CPEA had no effect on domestic commerce, may well give rise to an inference that no such evidence exists, 2 Wigmore § 285. If the "burden" theory were thought to have some substance as an appropriate question of fact, the case should be returned to the district court for the taking of evidence on the point, *Willing* v. *Bienstock,* 302 U.S. 272, or referred for investigation and consideration to the Federal Trade Commission (see, 15 U.S.C. § 46(h)), which has special responsibilities and expertise in this area.

tive prices. A total of twenty domestic, and ten foreign, competitors submitted bids for the business, and on every occasion Korea had alternative sources of supply from which to choose. Prices appear to have been freely competitive, with a general trend downwards, and CPEA's own bids were invariably in the lower range of tenders. (App. 327-340).

CPEA's many competitors were substantial concerns. To the extent that the association was able to offer larger tonnages than other suppliers, the inference is plain that export cooperation and organization served as the pro-competitive export stimulus which Congress intended it to be.[55] Indeed, the success of CPEA's initial efforts in developing and supplying Korean demand for phosphate fertilizers appears to have induced greater competitive activities by other suppliers. In 1961 and 1962, only three American producers of concentrated phosphates competed with CPEA on Korean procurements, and their total offers amounted to only 59,000 tons. During the same period, six foreign suppliers offered 50,000 tons of high-grade, and a far larger quantity of low-grade, fertilizers. (App. 327-330). Beginning in 1963, however, twelve "new" American producers, and at least five foreign sellers, joined the competition, and the total of offers to sell substantially exceeded Korea's requirements. (App. 331-340).[56]

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[55] The sporadic sallies which other American phosphate producers comparable in size to the defendants made in the Korean market indicate the likelihood that, if there had been no CPEA, American participation as a supplier to that market would have been greatly diminished and there might well have been a general supply shortage at particular times. (App. 327-340).

[56] The record suggests that phosphates may have been in relatively short supply during the early part of the period involved in this case. Diammonium phosphates, first developed in 1959, were not available in commercial quantities until 1962 and were not purchased by Korea until 1964 (App. 44, Stip. 9; App. 333).

Read as a whole, the stipulated record is convincing evidence that CPEA's activities burdened no one. It is conceded that the association observed the "competitive market price" test laid down by the AID regulations (App. 183, § 201.63; App. 342-344), that it neither restrained the export trade of any domestic competitor nor artificially affected domestic prices (App. 42, 45, Stip. 1, 12), and that its activities in Korea supplemented the efforts of AID and Korean officials to increase the productivity of Korea's agriculture through more effective use of fertilizers (App. 53, Stip. 32).

It is reasonable to assume that, because of economies of scale, CPEA's selling costs were lower than those of the individual companies would have been, so that it is impossible on this record to draw any inferences as to the prices which its members might have offered as individuals during the same period of time. Costs of customer contact, market development, bid preparation and contract administration, as well as shipping costs, were proportionately less on a shared basis.

Appellant relies heavily here on the close supervision which AID is said to have exercised over these transactions, and on the comprehensive nature of the AID regulations. But those are factors which are themselves persuasive evidence that the government's position is theoretical only. The regulations provide that AID will not finance a transaction at a price higher than "the market price prevailing in comparable export sales in the United States" or "in comparable domestic sales in the United States." If it had really been thought that CPEA's sales were a "burden" on the foreign assistance program, AID, as the District Court found, "was not without remedy or means to dis-

courage or stop such activities" (App. 365) pursuant to its regulatory control.[57]

B. Nor Was There Any "Burden" in Law

The heart of appellant's theoretical argument is found in the assertion that "under familiar principles of construction designed to preserve the national policy in favor of competition, . . . the Webb-Pomerene Act must be closely confined within the scope of its intended purpose" (GB. 13-14). On the assumption that the "national policy of competition" applies here, it is then concluded that CPEA's activities have deprived the foreign assistance program of "the benefits of competition" *among the association's members* and are in conflict with the policy of that program (GB. 24).

The argument proceeds from the results desired and is based on invalid premises. The only question is whether the Sherman Act applies at all, and that is to be determined from an examination of the facts indicating whether the defendants were engaged in "export trade."

Cooperative export associations, particularly CPEA, stimulate rather than suppress competition for export sales by assisting American producers to be more effective in meeting foreign suppliers in the struggle for position in world trade. The essential "restraint" which the Export

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[57] As already noted, AID acted in part in late 1966 to amend its regulations to bar export associations from bidding on "U.S.-source only" transactions which it was asked to finance, 22 C.F.R. 201.52 (a)(7) (1968). Point II of the Government's brief (pp. 26-28) wholly misconceives the significance to this case of the AID regulations. It has never been suggested, either by defendants or by the district court, that those regulations might give rise to any kind of antitrust exemption. The exemption stems solely from the Webb Act. The regulations do, however, demonstrate the contrived nature of appellant's "burden" argument, as Judge Ryan pointed out.

Trade Act permits is the elimination of export competition among individual producers who form a cooperative association under proper auspices; but once the association has been so organized and takes on existence as a separate entity, it is itself fully subject to the antitrust laws in the conduct of its business and may not combine or conspire with *its* competitors in restraint of the foreign trade or commerce of the United States. *United States Alkali Export Ass'n Inc.* v. *United States,* 325 U.S. 196.[58]

This was the instrument chosen by Congress to carry out the "national competitive policy" in the struggle for export markets. It should apply *a fortiori* where, as here, the competitive foreign market is financed by foreign assistance grant funds, with the consequence that each success by a foreign bidder added to the debit side of America's balance of payments.[59]

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[58] The government's district court brief in *Alkali Export* noted that Webb-Pomerene was adopted "to enable co-operative groups to function in export trade with the same freedom as that exercised by a single individual or corporation." Brief for the United States, *United States* v. *Alkali Export Ass'n,* Civ. 24-464 (S.D.N.Y.) filed June, 1944, at p. 40.

[59] If export associations are to be permitted and encouraged to bid in foreign markets financed by AID *loans,* (GB. 18), no good reason is perceivable why they should not be encouraged to do so in foreign markets which are financed by *grants* available to pay for purchases made from foreign, as well as American, suppliers. The "burden," if any, which arises from these transactions arises from the *fact* of the grants, and not from the use to which they are put, except that an additional "burden" is created when the foreign supplier is successful in competing for the available business. When CPEA succeeded, on the other hand, the burden was reduced, for the dollars remained in this country's economy. Moreover, the counterpart funds which were created in Korea as a result of these transactions represented a major return to the United States, which, as the district court found, "may well be incalculable and far exceed measurement in dollar and cents standards." (App. 361) But for those funds, which went to support Korea's Army, in Korea and Vietnam, and for other foreign assistance purposes, it may be assumed that there would have been a further call on the taxpayer's dollar for aid funds.

The selection of a cooperative organization as an instrument for carrying out a policy of effective competition is not the aberration appellant presumes. An express Congressional intent to grant exemptions from the antitrust laws has been manifested in a wide range of important commercial areas, and it is estimated that 18.4% of our national income now originates in such exempt areas. KAYSEN and TURNER, ANTITRUST POLICY 42 (1959). Typical of such exemptions in the domestic market are Section 6 of the Clayton Act, 15 U.S.C. § 17, and the Capper-Volstead Act, 7 U.S.C. §§ 291, 292.[60]

A Congressional policy of pro-competitive exemptions is particularly marked in the area of foreign trade and commerce. Aside from the Webb Act, other important manifestations of the policy are the Shipping Act, 46 U. S. C. §§ 813(a), 814; the Merchant Marine Act of 1920, 46 U.S.C. § 885(b); the Balance of Payments Antitrust Exemption Act of 1965, 31 U.S.C. § 932(c); and the Fisheries Cooperative Act of 1934, 15 U.S.C. §§ 521, 522. While each of these statutes serves a distinct objective, the policy of assisting American business to compete for foreign trade is common to all.[61]

Since the exemption provided by the Webb-Pomerene Act is both explicit and closely related to consistent policy

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[60] See, also, Section 708 of the Defense Production Act, 50 U.S.C. § 2158(b); and the Small Business Act, 15 U.S.C. § 640(b).

[61] See, *e.g.*, S. REP. No. 860, 87th Cong., 1st Sess., p. 5 (1961) accompanying amendments to the Shipping Act: "Since most carriers cannot operate as cheaply as some competitor which possesses national cost advantages, the conference affords a device whereby all carriers, working as a group, set rates at a point where such an advantage is not absolutely controlling." A logical corollary to appellant's position in this case would be that the members of a shipping conference lose the antitrust exemption when they transport AID-financed commodities, at AID-financed rates, from the United States abroad.

in the foreign trade area, there is no basis for urging that it be narrowly construed. Nor is a different result justified by appellant's references to a policy of competitive bidding,[62] since on the facts here it is plain that CPEA bid in active competition with a number of substantial suppliers, and it is conceded that the Korean procurements were at reasonable and competitive prices.

Appellant's recourse to *per se* principles of antitrust illegality (GB 24) is entirely inappropriate in testing the scope of an antitrust exemption which expressly precludes the application of those principles to the trade exempted, and where, moreover, the basis of the government's argument is injury to the buyer (as it sees the case) and not injury to competition. Cf. *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 6. Appellant's reasoning here flatly contradicts the entire purpose and theory of Webb-Pomerene: to permit combination and cooperation in export trade in order to further competition for world markets. To the extent that such combinations may operate to the direct disadvantage of domestic buyers, the statute contains an express, protective proviso,[63] but appellant has stipulated that CPEA has not had that effect and may not now take an inconsistent position.

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[62] We are aware of no similar instance in which it has been suggested that otherwise exempt associations may lose that exemption when dealing with the government. Government agencies presumably purchase goods sold by agricultural cooperatives and patronize shipping lines which are conference members. See, *Antitrust Exemptions*, 33 A.B.A. ANTITRUST L.J. at 24, n. 28 (1967).

[63] "*Provided:* That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein." 15 U.S.C. § 62.

Appellant's case here is much like that which it brought to this Court in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, and should be disposed of in the same manner:

> "On its face the contention would seem to run in the teeth of the language and the purpose of Section 5(11). Nothing in its terms indicates an intention to create one authority for rail consolidations and another for motor mergers. Identical provisions govern both. And to restrict the application of the section to motor carriers in the manner urged would nullify its operations as to them. The attack, when carried to such an extent, comes down to one upon the policy which Congress has declared. It has done so in terms which do not admit of nullification by reference to the varying conditions under which different types of carriers were brought within the statute's operation. It is not for this court, or any other, to over-ride a policy, or an exemption from one, so clearly and specifically declared by Congress, whatever may be our views of the wisdom of its action." 321 U.S. at 78-79

Conclusion

For all of the foregoing reasons, the judgment below should be affirmed or, in the alternative, the case remanded with instructions to vacate the judgment below and to enter an order of dismissal for mootness.

Respectfully submitted,

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August 5, 1968

TABLE I

PURCHASE, SUPPLY AND FINANCING RESPONSIBILITIES
IN KOREAN AID-FINANCED PURCHASES OF CONCENTRATED PHOSPHATES

	Republic of Korea	Suppliers	United States
Basic Agreements	Korea signs Mutual Defense and Assistance treaties with U.S.		U.S. signs Mutual Defense and Assistance treaties with Korea.
Korean Import Program	Korean agencies estimate import needs; decide types and concentrations of fertilizer to buy.	CPEA promotes and advertises products in Korea to increase demand for concentrated phosphates.	AID reviews Korean estimates; recommends total aid program to Congress, which appropriates funds.
Financing	Korea asks AID to finance specific commodity purchases.		AID agrees to finance from funds it has allocated for Korea.
Purchasing*			
(1) Announcement	OSROK sets terms and conditions, and solicits bids from suppliers; gives notice to AID.	Receive invitation to bid from OSROK and announcement from AID.	
(2) Bidding	OSROK receives and evaluates bids in Korea.	Submit bids to OSROK in Korea; certify to OSROK and AID that bid price not above "comparable export price."	AID reviews documents.
(3) Purchase Contract	OSROK awards contracts; submits bid abstract to AID 20 days after tender; Bank of Korea opens letter of credit through Schroder Bank (U.S.).	Execute contract with OSROK; post performance bond with OSROK; responsible to OSROK for any default.	
(4) Shipment	OSROK arranges shipping and insurance; notices shippers to load; inspects material (samples sent to Korea).	Ship at OSROK's call, responsible to OSROK for demurrage and other charges.	
(5) Payment	Bank of Korea instructs Schroder Bank to make payments; pays Schroder Bank's fee, and pays for non-U.S. flag shipping.	Receive payment from Schroder Bank against shipping documents.	AID pays Schroder Bank against voucher and supplier's shipping documents.
(6) Default	OSROK holds supplier liable for default; is liable to AID, if AID regulations not met.	Liable for non-performance to OSROK.	Can seek refund from OSROK if regulations not met or act against supplier if price regulations not met.
Sale to Consumer	Korean agency sells to consumers; deposits counterpart funds.		U.S. determines use of counterpart funds.

* GSA handled two purchases for OSROK, with Korea's approval and on its instructions for shipping, etc.